APPEAL NO. 93521

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On May 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant's (claimant) injury of (date of injury), did not include his left shoulder. Claimant asserts that he first told a doctor of his left shoulder on (date), but that doctor did not record it; he asks that this review find that his left shoulder was injured. Respondent (carrier) replies that the evidence is sufficient to uphold the hearing officer.

DECISION

We affirm.

At the hearing the parties agreed that the issue was whether claimant's injury to his left shoulder is related to his on-the-job injury of (date of injury).

Article 8308-6.43(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested."

Claimant asserts error in Findings of Fact Nos. 4 through 7 which relate to whether his left shoulder was injured in the incident of (date of injury).

The Appeals Panel determines:

That there is sufficient evidence to support the findings of fact in issue and to support the decision and order.

Claimant testified that on (date of injury), he lifted two five gallon buckets of paint out of a trunk of a car while working at Apartments, and when he set them down he felt a pop. He stated that he felt "all kinds of pain" but never stated where he felt the pop or how that area felt. He went to (Dr. C) first and told him of pain in his back, neck, right shoulder with numbness in his right hand and both legs. He testified that he saw Dr. C once and did not tell him of his left shoulder. On cross-examination claimant acknowledged that he saw Dr. C three times, on August 2, 6, and 15 and did not refer to his left shoulder.

Claimant estimated that it was about a week from his injury when he first saw (Dr. K). The first record placed in evidence by claimant regarding care by Dr. K has a date of (date) (over seven weeks after the injury), and that entry records a history consistent with a patient's first visit to the doctor. This doctor refers to the "pop" as being in the back of the neck. He refers to two areas, "#1" and "#2." Under "#1" he states, "Cervical pain intermittent described as sharp pain that radiates up to head and down across both shoulders Rt & Lt. . . ." Under "#2" he lists "LBP . . .intermittent . . .radiates down toward the tail bones. . . ." Elsewhere in the entry for September 25th, Dr. K lists "pain in the Rt shoulder. . ." without mentioning the left shoulder. Dr. K made one entry in October, two in November and three in December without mentioning the left shoulder, although he

mentioned the right shoulder.

A physical therapy note of November 18, 1991, mentions "rt (more than) lt" (circled on the record in evidence), but this entry is on the same line immediately after "leg numbness and weakness." The physical therapist does say on "11/30/92" (emphasis added) that claimant complained of his neck and "shoulders." On March 6, 1992, (Dr. S) notes complaints in regard to claimant's back, neck, right shoulder, right hand and ordered an MRI of "neck & both shoulders." On March 6, 1992, there is also a medical record note that is very faint but appears to say "L shoulder also painful but not as much as R"; the page has no doctor's name on it but from its format it appears to be an entry by Dr. S.

(Dr. Sh) in 1993 describes the left shoulder as "impingement syndrome of the left shoulder secondary to large osteophytes in the acromioclavicular joint and hypertrophic changes of the greater tuberosity." ("Osteophytes" are bony outgrowths; "hypertrophic" is the overgrowth of an organ; and "tuberosity" is an elevation or protuberance.) Claimant did not make it clear how he got to see Dr. Sh, but said he saw him several times; he did not describe him as a doctor to whom the carrier sent him as he did describe (Dr. J).

Dr. J, on January 14, 21, 29 and February 12, 1992, evaluated the claimant for the carrier. His reports do not reference the left shoulder at all, but address the neck complaints as, "degenerative cervical spine disease existed prior to the industrial injury of 1991 and is related to the natural progression of a non-industrial injury, ie., the natural aging process. These degenerative changes were possibly temporarily but no (sic) permanently aggravated by the industrial injury of the 2nd, 1991." He also stated, "(e)lectrodiagnostic testing of the right upper extremity is normal with no evidence of cervical radiculopathy, plexopathy or entrapment neuropathy. . . ."

The Appeals Panel has addressed similar cases in which the issue is whether a particular injury was caused by a work-related accident. Texas Workers' Compensation Commission Appeal No. 92326, decided August 28, 1992, affirmed a hearing officer's decision that a back injury, when first recorded in medical records between six and seven months later, was not related to a compensable injury to the knee and ankle. Then in Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, a decision against compensability of an injury that was not promptly recorded in medical records was reversed. This opinion noted that the accident had been a significant one, that it contained significant trauma, that there was no evidence inconsistent with the injury as the basis for the problem, that there was evidence (other than claimant's own testimony) of pain suffered to the area within days of the general injury, that its connection to the event could be understood through common knowledge, and that doctor's statements were consistent with the connection to the injury. Thereafter Texas Workers' Compensation Commission Appeals No. 92617 and 93086, decided January 14, 1993 and March 17, 1993, respectively, affirmed hearing officer's opinions which found injuries were not compensable when not

promptly recorded in medical records.

The latter two appeals upheld findings of no compensability for particular injuries recorded seven weeks after the injury and five months after, respectively. One involved a report of injury of a right leg and groin which was compensable, but the first treatment for the left leg and toe five months later was not compensable. The other involved a compensable injury to the middle and lower back. Neck pain mentioned seven weeks after the trauma to the third doctor seen was considered not shown to be related by the hearing officer. On the other hand, the Appeals Panel has also affirmed hearing officer's decisions that found particular injuries compensable after not being reported to a doctor for as long as six months, or even a year. The determination is one of fact for the hearing officer to make; instances in which the hearing officer's factual findings on this issue were against the great weight and preponderance of the evidence have been few.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. The hearing officer as finder of fact could believe that claimant's problem with his left shoulder did not promptly follow the August 2nd injury. *See* Insurance Company of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969). He could choose to give weight to medical opinion that described the left shoulder problem, when reported, as involving bony outgrowths. *Compare to* Hartford Accident & Indemnity Co. v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist] 1973, writ ref'd n.r.e.) in which a physician stated that the injury was caused by trauma. He could believe that the September 25, 1991 note of Dr. K that referred to "cervical pain. . .that radiates up to head and down across both shoulders. . ." was not a report of left shoulder injury, but of a neck injury. The medical records sufficiently support the hearing officer's determination that the claimant did not complain of pain or injury to his left shoulder until seven months after the incident of 2nd. As a result, he could find that the claimant did not injure his left shoulder on 2nd. The hearing officer could believe that the report of Dr. Sh indicated that the problem with claimant's left shoulder was the result of bony growths; his finding to that effect was supported by sufficient evidence. The hearing officer is also the judge of medical evidence just as he is of other evidence. *See* Atkinson v. US Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). *Also see* Gregory v. TEIA, 530 S.W.2d 105 (Tex. 1975) which allows the finder of fact to decide what weight to give deductions reached by experts in regard to the facts of the case.

The findings of fact and the decision and order of the hearing officer are sufficiently supported by the evidence. Affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge